

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 13, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2011AP2418**

**Cir. Ct. No. 2009CV1310**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**CITY OF MARSHFIELD,**

**PLAINTIFF-RESPONDENT,**

**V.**

**KRAY A. BURKART,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Marathon County:  
GLENN H. HARTLEY, Judge. *Affirmed.*

¶1 MANGERSON, J.<sup>1</sup> Kray Burkart, pro se, appeals an order denying his motion to vacate a default judgment. Burkart argues the circuit court

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

erroneously exercised its discretion by denying his motion to vacate the judgment. We reject Burkart's arguments and affirm.

### **BACKGROUND**

¶2 The City of Marshfield issued Burkart a disorderly conduct citation. Following a trial, a municipal court adjudicated Burkart guilty. Burkart appealed to the circuit court and requested a jury trial.

¶3 The court scheduled a jury trial for August 25, 2010. When Burkart failed to appear at trial, the court entered a default judgment in favor of the City. Two days later, the court received a letter from Burkart, moving for a continuance of the jury trial because he was incarcerated.

¶4 The court denied Burkart's request. It noted that Burkart had been incarcerated well before the scheduled jury trial and he waited until the day of trial to mail his request for a continuance. The court found there was "absolutely" no reason why he could not have "made this request at a time when the Court would have been in a position to give it some serious consideration." The court also noted that, on the day of trial, the City appeared with all of its witnesses and "the jury was ready to go." It explained that, based on Burkart's nonappearance, it had granted default judgment in favor of the City.

¶5 Approximately one year later, on August 25, 2011, Burkart filed a motion to vacate the court's default judgment, pursuant to WIS. STAT. § 806.07(1)(a), (b), (c), (d), and (h). In support of his motion, Burkart argued: (1) he had a legitimate excuse for his nonappearance—specifically, he was in "clinical observation" for physical and mental health issues and did not have

access to the courts; (2) the circuit court lacked subject matter and personal jurisdiction; and (3) there was newly discovered evidence.

¶6 The circuit court denied Burkart's motion without a hearing. It reasoned Burkart had failed to offer anything to substantiate his claim that he was prevented from accessing the courts and Burkart offered no explanation as to why he waited one year to make that argument. It also noted it had previously considered Burkart's jurisdictional challenges at a motion hearing and "much of the material provided by the defendant is simply a re-hash of arguments made earlier by the defendant in regard to jurisdictional issues." The court concluded it had subject matter jurisdiction because the ordinance violation occurred in Marathon County and it had personal jurisdiction because the City personally served the citation on Burkart. The court next determined Burkart had failed to "establish that there [was] newly discovered evidence which was not available at the time of trial or that [his] motion [was] in compliance with WIS. STAT. § 805.15(3)."<sup>2</sup> Finally, the court concluded Burkart's motion was not brought within a reasonable time and any mistake, inadvertence, surprise or neglect was not excusable and solely caused by Burkart. Burkart appeals.

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<sup>2</sup> WISCONSIN STAT. § 805.15(3) provides:

[A] new trial shall be ordered on the grounds of newly-discovered evidence if the court finds that:

- (a) The evidence has come to the moving party's notice after trial; and
- (b) The moving party's failure to discover the evidence earlier did not arise from lack of diligence in seeking to discover it; and
- (c) The evidence is material and not cumulative; and
- (d) The new evidence would probably change the result.

## DISCUSSION

¶7 The determination of whether to vacate a default judgment is within the circuit court’s discretion. *Johnson v. Cintas Corp. No. 2*, 2012 WI 31, ¶22, 339 Wis. 2d 493, 811 N.W.2d 756. We will not disturb the circuit court’s discretionary determination unless the court erroneously exercised its discretion. *Id.* “‘A circuit court erroneously exercises its discretion if it applies an improper legal standard or makes a decision not reasonably supported by the facts of record.’” *Id.* (quotation omitted).

¶8 Burkart first argues his motion to vacate the default judgment was timely filed and, therefore, the circuit court erred by denying his motion. Burkart emphasizes that he moved to vacate the judgment pursuant to WIS. STAT. § 806.07(1)(a), (b), (c), (d), and (h).<sup>3</sup> He notes that a motion for relief that sounds in paragraphs (a), (b), or (c) must be brought within one year, and a motion for relief that sounds in paragraphs (d) or (h) must be brought within a “reasonable

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<sup>3</sup> WISCONSIN STAT. § 806.07, which is entitled “Relief from judgment or order,” provides, in relevant part:

(1) On motion and upon such terms as are just, the court ... may relieve a party ... from a judgment, order or stipulation for the following reasons:

- (a) Mistake, inadvertence, surprise, or excusable neglect;
- (b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15(3);
- (c) Fraud, misrepresentation, or other misconduct of an adverse party;
- (d) The judgment is void;

....

(h) Any other reasons justifying relief from the operation of the judgment.

time.”<sup>4</sup> Burkart argues that, because he moved to vacate the default judgment 365 days after it was entered, his motion was timely and, therefore, the circuit court erred by denying it.

¶9 However, Burkart is not entitled to relief simply because he moved to vacate the default judgment within one year. Irrespective of when Burkart’s motion was filed, Burkart still bears the burden of establishing he is entitled to relief under WIS. STAT. § 806.07(1). See *Connor v. Connor*, 2001 WI 49, ¶28, 243 Wis. 2d 279, 627 N.W.2d 182. Further, and contrary to Burkart’s argument, the court did not deny his motion simply because it was untimely. Rather, the court considered the allegations in Burkart’s motion and determined he had failed to establish he was entitled to relief.

¶10 Burkart next argues he is entitled to relief from the default judgment because the circuit court lacked subject matter and personal jurisdiction. In response, the City emphasizes that Burkart raised these arguments in the circuit court—before the default judgment was entered—and the circuit court determined it had subject matter and personal jurisdiction. The City argues that, because the circuit court disposed of these issues before entering its default judgment, Burkart cannot reargue these issues in his motion to vacate the judgment. We agree. See *Ver Hagen v. Gibbons*, 55 Wis. 2d 21, 25, 197 N.W.2d 752 (1972) (concluding an

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<sup>4</sup> WISCONSIN STAT. § 806.07(2) provides:

The motion shall be made within a reasonable time, and, if based on sub. (1) (a) or (c), not more than one year after the judgment was entered or the order or stipulation was made. A motion based on sub. (1) (b) shall be made within the time provided in s. 805.16 [newly discovered evidence motions may be made within one year]....

order entered on a motion to vacate a judgment is not appealable when the issues included in the motion were disposed of by the original judgment or order).

¶11 In any event, when denying Burkart’s motion to vacate, the circuit court concluded that the jurisdictional arguments presented in Burkart’s motion were simply a “re-hash” of arguments previously made, and that it had subject matter and personal jurisdiction. Subject matter jurisdiction refers to a court’s ability to hear a particular type of case. *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶8, 273 Wis. 2d 76, 681 N.W.2d 190. In Wisconsin, circuit courts have “subject matter jurisdiction to entertain actions of any nature whatsoever.” *Id.*; WIS. CONST. art. VII, § 8 (“Except as otherwise provided by law, the circuit court shall have original jurisdiction in all matters civil and criminal within this state.”). Here, Burkart was issued a disorderly conduct citation for events that occurred in Marathon County, Wisconsin. The circuit court had subject matter jurisdiction.

¶12 As far as personal jurisdiction, a municipal court obtains personal jurisdiction over a defendant if the citation is personally served on the defendant. WIS. STAT. § 800.01(2)(a). Here, although Burkart argues the court lacked personal jurisdiction because the citation listed an incorrect address and driver’s license number, the citation was personally served on Burkart at the time of the offense. The municipal court, and the circuit court, had personal jurisdiction over Burkart.

¶13 Burkart next argues he is entitled to relief from the circuit court’s default judgment because insufficient evidence supported the municipal court’s determination that he committed disorderly conduct. He also argues the municipal court erred by concluding it had subject matter jurisdiction. The municipal court’s determinations, however, have nothing to do with the circuit court’s order denying

Burkart's motion to vacate the default judgment. We will not address arguments outside the scope of this appeal.

¶14 Finally, we observe that, in Burkart's motion to vacate the default judgment, Burkart also argued his absence from the jury trial was excusable and newly discovered evidence warranted relief. However, on appeal, Burkart does not develop any legal arguments in support of these assertions. We will not consider them. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (“[A]n issue raised in the trial court, but not raised on appeal, is deemed abandoned.”).

¶15 In sum, we conclude Burkart has not established the circuit court erroneously exercised its discretion by denying his motion to vacate his default judgment. We affirm the order of the circuit court.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

